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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DELBERT RAY JAMES,

Defendant and Appellant.

G046466

(Super. Ct. No. 10CF0521)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed in part, reversed in part and remanded.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Delbert James guilty of first degree burglary as charged in count one of the information, possession of a firearm by a felon as charged in count four, receiving stolen property (watches) as charged in count five, attempted first degree burglary as charged in count six, six counts of grand theft (firearm) as charged in counts seven through 12, and three counts of loitering as charged in counts 14 through 16. The court sentenced defendant to state prison for a term of 11 years and eight months.

In sentencing defendant on the six counts of grand theft (firearm), the court stayed imposition of sentence on all six convictions pursuant to Penal Code section 654. (All statutory references are to the Penal Code.) In his appeal, defendant contends his six grand theft of firearms convictions constituted a single offense in violation of section 487, subdivision (d)(2), and that five of the six counts must be reversed. We note that, despite the fact defendant was not punished for these six felonies, “grand theft involving a firearm” is a serious felony under the “Three Strikes” law. (§ 667, subd. (a)(4); § 1192.7, subd. (c)(26).)

We agree with defendant that he should have been convicted of only one count of grand theft (firearm). We reverse five of his six convictions of grand theft (firearm).

I

FACTS

Mark Graham, an airline pilot and a Reserve Colonel in the Marine Corps, lives on Silk Tree Drive in Tustin. On March 4, 2010, he was in New Orleans for a monthly drill. When he returned home, many of his possessions were missing, including watches, a coin collection of “various moneys from around the world,” “a couple thousand dollars,” a pair of Bose headphones, and his lap top computer. He described six firearms which were also missing: a Mossberg shotgun was under his bed in a nylon

case; a Ruger Redhawk, a .45-caliber gun and a Broomhandle Mauser were in the armoire; an Astra Constable was in the drawer by his bed; and a .357 Smith & Wesson was either in the armoire or bedside table.

Colton Kirwan is a detective with Tustin Police Department. After defendant was arrested on March 4, 2010, Kirwan went to a tow yard to examine and photograph the white Taurus defendant was driving. In the trunk of the car were the various possessions Graham described that were in his home before he traveled to New Orleans.

II

DISCUSSION

Defendant contends he was convicted of six counts of grand theft firearm as charged in counts seven through 12, and that they constitute only a single offense and five of the six convictions must be reversed. The Attorney General concedes “there was no substantial evidence from which the jury could infer multiple intents or objectives,” but argues the plain language of the theft of a firearm statute indicates that each firearm theft should constitute a separate offense.

In *People v. Bailey* (1961) 55 Cal.2d 514, the defendant was found guilty of grand theft in unlawfully taking \$3,064. The court considered “whether she was guilty of grand theft or of a series of petty thefts since it appears that she obtained a number of payments, each less than \$200” (*Id.* at p. 518, fn. omitted.) The *Bailey* court stated: “Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]” (*Id.* at p. 519.)

“Grand theft is theft committed in any of the following cases: [¶] . . . [¶]
(d) When the property taken is any of the following: [¶] . . . [¶] (2) A firearm.” (§ 487.)
“[T]he singular number includes the plural, and the plural the singular.” (§ 7, subd. 21.)

We decline the Attorney General’s invitation to follow the Florida Supreme Court’s decision in *Grappin v. State* (Fla. 1984) 450 So.2d 480 (*Grappin*), and find defendant’s grand theft of six firearms during a single burglary may form the basis of six separate grand theft convictions. In *Grappin*, the court found “the use of the article ‘a’ [as opposed to “any”] in reference to ‘a firearm’ in [the statute] clearly shows that the legislature intended to make each firearm a separate unit of prosecution.” (*Grappin*, *supra*, 450 So.2d at p. 482.)

The Attorney General also cites the Wisconsin Supreme Court in *State v. Trawitzki* (Wisc. 2001) 244 Wis.2d 523 [628 N.W.2d 801], a case in which a defendant was charged with 10 theft charges for stealing 10 firearms. Faced with a statute containing the same language as California’s grand theft statute and another similar statute to California that the singular includes the plural, the Wisconsin court held their “legislature’s use of the singular form of the word ‘firearm’ indicates that the legislature intended a separate charge for each individual firearm.” (*Id.* at p. 543, fn. omitted.)

We also decline to follow the Wisconsin court. Here the facts disclose a single burglary. We conclude the thefts were committed pursuant to one general plan. Our Supreme Court has set forth the rule in *People v. Bailey*, *supra*, 55 Cal.2d at page 519, and we are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As defendant states in his brief: “If the Legislature wishes to discourage multiple firearm thefts, it can amend Penal Code section 487 to state that the theft of each firearm represents a separate offense.”

III

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded with directions for the clerk of the court to amend the abstract of judgment to reflect a conviction of only one count of grand theft (firearm.) A copy of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.